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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

COLLEEN M. WENSLEY,

Plaintiff,

vs.

FIRST NATIONAL BANK OF NEVADA;  
STEWART TITLE COMPANY; NATIONAL  
DEFAULT SERVICING CORPORATION;  
AMERICA'S SERVICING COMPANY;  
CHICAGO DEFAULT SERVICES; STANLEY S.  
SILVA; and DOES 1-25 CORPORATIONS, DOES  
and ROES 1-25 Individuals, Partnerships, or anyone  
claiming any interest to the property described in  
the action,

Defendants.

Case No. 3:11-cv-00809-ECR-WGC

**STATUS REPORT CONCERNING  
REMOVAL**

Plaintiff, COLLEEN M. WENSLEY ("Plaintiff"), by and through her attorney, Rick Lawton, Esq. of LAW OFFICE OF RICK LAWTON ESQ. PROF. CORP., Defendant STANLEY S. SILVA ("Silva"), by and through his attorney, Christina H. Wang, Esq. of FIDELITY NATIONAL LAW GROUP and Defendant Wells Fargo Bank, N.A. dba America's Servicing Company ("Wells Fargo"), by and through their attorney, Christine M. Parvan, Esq. of AKERMAN SENTERFITT LLP submit the following Joint Status Report Regarding Removal as required by this Honorable Court's November 10, 2011 Minute Order (Docket No. 4):

***1. The Status of this Action, including a List of Any Pending Motions and/or Other Matters Which Require the attention of this Court.***

On November 9, 2011, Silva filed a Motion to Dismiss Plaintiff's Complaint (Docket No. 3).

2. *A Statement By Counsel of Action Required to be Taken by this Court.*

This Court is not required to take any action until the pending motions are fully briefed.

3. *Copies of Pending Motions, Responses and Replies thereto and/or Any Other Matters Requiring the Court's Attention Not Previously Attached to the Notice of Removal.*

The following documents are attached for this Honorable Court's review:

- Silva's Motion to Dismiss (Docket No. 3); (Exhibit A)

DATED this 13<sup>th</sup> day of December, 2011. FIDELITY NATIONAL LAW GROUP

/s/ Christina H. Wang

Christina H. Wang, Esq.  
Nevada Bar Number 9713  
2450 St. Rose Pkwy., Ste. 150  
Henderson, Nevada 89074  
Attorneys for Defendant *Stanley S. Silva*

DATED this 13<sup>th</sup> day of December, 2011. LAW OFFICE OF RICK LAWTON P.C.

\*\*Unable to obtain signature\*\*

Rick Lawton, Esq.  
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1460 Hwy. 95A, North #1  
Fernley, Nevada 89408  
Attorney for Plaintiffs

DATED this 13<sup>th</sup> day of December, 2011. AKERMAN SENTERFITT LLP

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Ariel E. Stern, Esq.  
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Christine M. Parvan, Esq.  
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Attorney for Defendants Wells Fargo Bank,  
N.A. dba America's Servicing Company

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically transmitted the foregoing **JOINT STATUS REPORT CONCERNING REMOVAL** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties listed as CM/ECF registrants, or to the following non-registrants by U.S. Mail, on the date below shown.

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**DATED:** 12-13-2011

Andrea Suttell  
An employee of Fidelity National Law Group

## **EXHIBIT “A”**

## **EXHIBIT “A”**

1 Thomas A. Ryan, Esq.  
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6  
 7 **UNITED STATES DISTRICT COURT**  
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12 FIRST NATIONAL BANK OF NEVADA;  
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 14 SILVA; and DOES 1-25 CORPORATIONS, DOES  
 and ROES 1-25 Individuals, Partnerships, or anyone  
 15 claiming any interest to the property described in  
 the action,

16 Defendants.  
 17

Case No.

**DEFENDANT STANLEY S.  
 SILVA'S MOTION TO DISMISS**

18 Defendant, STANLEY S. SILVA ("Silva"), by and through their attorney of record,  
 19 FIDELITY NATIONAL LAW GROUP, respectfully move this honorable Court to dismiss  
 20 Plaintiff's Complaint with prejudice, pursuant to FRCP 12(b)(6), for Plaintiff's failure to state a  
 21 claim upon which relief can be granted. The Motion to Dismiss is supported by the following  
 22 Memorandum of Points and Authorities, the record herein, and any argument that may be  
 23 presented at any hearing hereon.

24 **POINTS AND AUTHORITIES**

25 **I. STATEMENT OF THE CASE**

26 On September 27, 2011 Plaintiff filed her Complaint against numerous defendants  
 27 including Silva. The Complaint alleges the following claims for relief: (1) Debt Collection  
 28 Violations; (2) Violation of Unfair and Deceptive Trade Practice Act; (3) Violation of Unfair

1 Lending Practices, NRS 598D.100; (4) Violation of the Covenant of Good Faith and Fair  
2 Dealing; (5) Violation of NRS 107.080 et seq.; (6) Quiet Title Action; (7) Fraud in the  
3 Inducement and through Omission; (8) Slander of Title; and (9) Abuse of Process.

4 For all of the reasons stated below, Plaintiff's Complaint should be dismissed with  
5 prejudice against Silva.

## 6 **II. STATEMENT OF THE LAW**

7 The standard of review applicable to a motion to dismiss under Rule 12(b)(6) is familiar;  
8 however, the Supreme Court has clarified the standard in significant ways. Rule 8(a)(2) requires  
9 that the complaint contain a "short and plain statement of the claim showing that the pleader is  
10 entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). According to the Supreme Court in *Ashcroft v.*  
11 *Iqbal*, 129 S.Ct. 1937 (2009), "the pleading standard Rule 8 announces does not require 'detailed  
12 factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-  
13 me accusation." *Id.* at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A  
14 pleading that offers 'labels and conclusions' or 'a formulaic recitation' of the elements of a cause  
15 of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

16 A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual  
17 enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). To "survive a motion to dismiss, a  
18 complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that  
19 is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "[O]nly a complaint that states  
20 a plausible claim for relief survives a motion to dismiss." *Id.* (quoting *Twombly*, 550 U.S. at  
21 556). Factual allegations are assumed true, but the court is "not bound to accept as true a legal  
22 conclusion couched as a factual allegation." *Id.* at 1949-50 (quoting *Twombly*, 550 U.S. at 555);  
23 *see also Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Based upon this  
24 standard, Plaintiff's Complaint should be dismissed.

## 25 **III. THE FIRST CAUSE OF ACTION FOR DEBT COLLECTIONS MUST BE** 26 **DISMISSED.**

27 In the first cause of action, Plaintiff alleges a claim for abusive debt collection practices  
28 in violation of federal and state laws. Plaintiff alleges that the Notice of Default ("NOD")

1 recorded in the official records of Washoe County violates 15 U.S.C. § 1692(a)(2). (Complaint,  
2 ¶72 and 73). The first cause of action fails because: (1) a non-judicial foreclosure proceeding is  
3 not a collection of a “debt” for purposes of FDCPA; and (2) the claim is barred by the statute of  
4 limitations.

5 **A. A Non-judicial Foreclosure Proceedings Is Not a Collection of a “Debt” for**  
6 **Purposes of FDCPA.**

7 Courts have routinely held that a non-judicial foreclosure proceeding is not a collection of  
8 a “debt” for purposes of FDCPA. *Hulse v. Ocwen Fed. Bank*, 195 F.Supp.2d 1188, 1204 (D.Or.  
9 2002) (distinguishing foreclosure of interest in property from efforts to collect a debt from  
10 debtor); *Gray v. Four Oak Court Ass’n*, 580 F.Supp.2d 883 (D. Minn. 2008) (foreclosure  
11 proceeding was not a debt collection covered by the FDCPA.) In this instance, Plaintiff’s claim  
12 relate to the collection of the Promissory Note and commencement of the non-judicial  
13 foreclosure. (Complaint, ¶74). The initiation of a non-judicial foreclosure proceeding is not a  
14 collection of a ‘debt’ as defined by the FDCPA. The first cause of action must be dismissed with  
15 prejudice for this reason.

16 **B. The FDCPA Claim is Barred by the Statute of Limitations.**

17 The statute of limitations for bringing a claim under the FDCPA is one year. 15 U.S.C. §  
18 1692 k(d); *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939 (D. Idaho, July 3, 2007).  
19 In this instance, Plaintiff executed the Promissory Note (“Promissory Note”, Complaint, ¶4) and  
20 Deed of Trust on or about July 27, 2005 (Complaint, ¶3). This action was filed on September 27,  
21 2011, well past the one year statute of limitations. The first cause of action is barred by the  
22 statute of limitations, and must be dismissed with prejudice.

23 **IV. THE SECOND CAUSE OF ACTION FOR UNFAIR AND DECEPTIVE TRADE**  
24 **PRACTICES FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A**  
25 **CAUSE OF ACTION.**

26 In the second cause of action, Plaintiff alleges that Defendants violated the Nevada Unfair  
27 and Deceptive Trade Practices Act because they did not have the required foreign collector’s  
28 license when they recorded the NOD in violation of NR 649.370. (Complaint, ¶81).



1 A foreclosure trustee does not have to be licensed to record a notice of default because a  
 2 foreclosure trustee is not a debt collector. See e.g., *Hulse*, 195 F. Supp. 2d at 1204. Further,  
 3 Plaintiff has failed to allege why or how Silva conducted business as a debt collector that should  
 4 have been licensed. As such, Silva is entitled to dismissal with prejudice of this second cause of  
 5 action for violation of Nevada's Unfair and Deceptive Trade Practices Act.

6 **V. THE THIRD CAUSE OF ACTION FOR UNFAIR LENDING PRACTICES MUST**  
 7 **BE DISMISSED BECAUSE SILVA WAS NOT OR IS NOT A LENDER.**

8 The third cause of action relates to how the Loan was selected and originated by the  
 9 lender. Specifically, the third cause of action alleges that the lender violated NRS 598D.100, "by  
 10 luring Plaintiff into said loan based solely on future equity and not from present income or other  
 11 assets." (Complaint, ¶86).

12 NRS 598D provides:

13 "1. It is an unfair lending practice for a lender to:

14 (a) Require a borrower, as a condition of obtaining or maintaining a home loan  
 15 secured by home property, to provide property insurance on improvements to  
 16 home property in an amount that exceeds the reasonable replacement value of the  
 improvements.

17 (b) Knowingly or intentionally make a home loan, other than a reverse mortgage,  
 18 to a borrower, including, without limitation, a low-document home loan, no-  
 document home loan or stated-document home loan, without determining, using  
 19 any commercially reasonable means or mechanism, that the borrower has the  
 ability to repay the home loan.

20 (c) Finance a prepayment fee or penalty in connection with the refinancing by the  
 original borrower of a home loan owned by the lender or an affiliate of the lender.

21 (d) Finance, directly or indirectly in connection with a home loan, any credit  
 insurance."

22 The term "Lender" does not apply to non-originating owners of the deeds of trust and  
 23 promissory notes. See *Velasquez v. HSBC Mortgage Servs.*, No. 2:09-cv-00784, 2009 WL  
 24 2338852, at \*3 (D. Nev. July 24, 2009) (dismissing NRS 598D claim against both servicer and  
 25 non-originating owner because they did not originate the Loan within the meaning of the statute).

26 Silva was not the Lender. The Complaint specifically provides and confirms that FIRST  
 27 NATIONAL BANK OF NEVADA, was the lender on the Promissory Note. (Complaint, ¶3).  
 28 Consequently, NRS 598D is inapplicable to Silva, and the third cause of action must be



1 dismissed with prejudice.

2 **VI. THE FOURTH CAUSE OF ACTION FOR VIOLATION OF THE COVENANT**  
3 **OF GOOD FAITH AND FAIR DEALING MUST BE DISMISSED BECAUSE**  
4 **SILVA WAS NOT A PARTY TO THE CONTRACT.**

5 The implied covenant of good faith and fair dealing requires each party to not do anything  
6 to destroy or otherwise injure the rights of the other to receive the benefit of the contract. *Hilton*  
7 *Hotels, Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 234 (1991). To establish a claim  
8 for breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1)  
9 the plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith  
10 and fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner  
11 unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied.  
12 *Id.*

13 Nevada law is clear. The implied covenant of good faith and fair dealing only extends to  
14 parties to the contract. *Id.* at 234. Logic dictates that someone who is a not a party to contact can  
15 not breach a covenant to that contract. Plaintiff's fourth cause of action is deficient against Silva  
16 because Silva was not a party to the Plaintiff's \$495,000.00 loan ("Loan", see Complaint, ¶4) or  
17 the securing Deed of Trust for the Loan ("Deed of Trust", see Complaint, ¶3). The Deed of Trust  
18 identifies Defendant FIRST NATIONAL BANK OF NEVADA as the Lender, Plaintiff as the  
19 borrower and STEWART TITLE COMPANY as the trustee. (Complaint, ¶3). Silva was not a  
20 party to any contracts with Plaintiff, and therefore could not violate the covenant of good faith  
21 and fair dealing.

22 Plaintiff also contends that she was lured into her Loan based upon future equity in the  
23 real property located at 1181 Harbor Cove Court, Sparks, Nevada, 89434 ("Subject Property",  
24 see Complaint, ¶2) and not her ability to pay. (Complaint, ¶36). Silva was not the originator of  
25 the Loan. Defendant FIRST NATIONAL BANK OF NEVADA originated the Loan and lured  
26 Plaintiff into taking out the Loan. (Complaint, ¶4). The Complaint fails to allege that Silva took  
27 any actions related to the origination of the Loan. Furthermore, the actions related to the  
28 origination of the Loan cannot constitute a breach of the covenant of good faith and fair dealing.

1 A contractual duty of good faith and fair dealing arises only after a contract is formed. *Haley v.*  
2 *Elegan Home Lending, LP*, 2010 WL 1006664, at \*2 (D.Nev. 2010) (“A party cannot breach the  
3 covenant of good faith and fair dealing before a contract is formed.”). Plaintiff cannot maintain a  
4 cause of action for breach of the covenant of good faith and fair dealing for actions which  
5 occurred prior to the formation of the contract. See *Velasquez v. HSBC Mortgage Services*, 2009  
6 WL 2338852, at \*9 (D. Nev. July 24, 2009) (no breach of the duty where contract has not been  
7 formed). The fourth claim for relief should be dismissed with prejudice.

8 **VII. THE FIFTH CAUSE OF ACTION FOR VIOLATION OF NRS 107.080 MUST BE**  
9 **DISMISSED.**

10 The fifth cause of action asserts that the recording of the NOD was improper because  
11 Plaintiff believes that the Promissory Note has been severed from the Deed of Trust. (Complaint,  
12 ¶100). However, Nevada law does not require the production of the original note before  
13 commencing non-judicial foreclosure proceedings. *Weingartner v. Chase Home Finance, LLC*,  
14 702 F.Supp.2d 1276, 1280 (D. Nev. 2010). Therefore, the commencement of the non-judicial  
15 foreclosure proceeding was proper without the production of the original note.

16 Next, Plaintiff asserts that the recording of the NOD was improper because the Loan had  
17 been securitized. (Complaint, ¶¶99-113). Plaintiff also contends that NRS 107.080 was not  
18 complied with, yet fails to allege what substitutions of trustee and other recorded documents are  
19 missing from the chain of title. In sum, Plaintiff alleges that “no money is owed to these  
20 Defendants who have claimed that her loan is in default”. (Complaint, ¶107).

21 Plaintiff’s allegations demonstrate a fundamental misunderstanding of the secondary  
22 mortgage market. The securitization of the Loan does not invalidate the recording of the NOD.  
23 See, *Chavez v. Cal. Reconveyance Co.*, 2010 U.S. Dist. LEXIS 63415 at, \*5 (D.Nev., July 17,  
24 2010)(“NRS 107.080 does not forbid the securitization of a loan. The alleged securitization of  
25 Plaintiff’s Loan did not invalidate the Deed of Trust, create a requirement of judicial foreclosure,  
26 or prevent Defendants from being holders in due course.”)

27 When a loan is transferred, assigned, sold or securitized, the deed of trust goes with the  
28 note. *Gomez v. Countrywide Bank, FSB*, 2009 WL 3617650 \*3 (D. Nev 2009) (“mortgage goes

1 with the note" and "a mortgage is a mere incident to the debt which it secures and follows the  
2 transfer of the note with the full effect of a regular assignment."); *Coward v. First Magnus*  
3 *Financial Corp.*, 2009 WL 3367398 \*8 (D.Nev. 2009) (mortgage follows the note). The  
4 borrower is obligated to repay the loan regardless of who owns the loan. The securitization  
5 process does not abrogate the borrower's contractual obligation to repay the Note or prevent  
6 foreclosure under the Deed of Trust. Plaintiff's assertions are red herrings that should be rejected  
7 by this Court.

8 The Complaint fails to allege that any defendants committed any act which would have  
9 violated NRS 107.080 et seq. For the above stated reasons, this fifth cause of action must be  
10 dismissed with prejudice.

11 **VIII. THE SIXTH CAUSE OF ACTION FOR QUIET TITLE MUST BE DISMISSED.**

12 Plaintiff seeks a declaration that title to the Subject Property is vested in her alone and  
13 that Defendants be declared to have no interest in the Subject Property. (*See* Comp. ¶141).  
14 Plaintiff's quiet title claim should be dismissed because it is dependent on his other failed claims.

15 But even if her other claims did not fail, quieting title is not a proper remedy in this case.  
16 "A quiet title claim requires a plaintiff to allege that the defendant is unlawfully asserting an  
17 adverse claim to title to real property." *Kemberling v. Ocwen Loan Servicing, LLC*, Case No.  
18 2:09-cv-00567, 2009 WL 5039495, at \*2 (D. Nev. Dec. 15, 2009). "The very object of the  
19 proceeding assumes that there are other claimants adverse to the Plaintiff, setting up titles and  
20 interests in the land or other subject-matter hostile to his [own]." *See Clay v. Scheeline Banking*  
21 *& Trust Co.*, 40 Nev. 9, 16, 159 P. 1081, 1082 (1916). Where such adverse claims exist, the  
22 party seeking to have another party's right to property extinguished, bears the burden of  
23 overcoming the "presumption in favor of the record titleholder." *See Breliant v. Preferred Corp.*,  
24 112 Nev. 663, 669, 918 P.2d 314, 318 (1996); *see Clay*, 40 Nev. at 16, 159 P. at 1082.

25 Here, Plaintiff admits she borrowed money, and then secured the Loan with the Deed of  
26 Trust. (Complaint, ¶¶3-4). There is no other party claiming any interest in Plaintiff's Subject  
27 Property that is adverse to Plaintiff's title and/or the Deed of Trust. Plaintiff's dislike for the  
28 Deed of Trust she executed does not create an adverse claim that entitles her to an order quieting

1 title. The only way this quiet title action would be necessary is if there was presently a dispute  
2 between two or more parties over the right to foreclose under the Deed of Trust. Plaintiff does  
3 not assert that more than one entity claims the right to foreclose on the Deed of Trust, so  
4 Plaintiff's claim to quiet title has no merit.

5 Further, because an action to quiet title is equitable in nature, *see MacDonald v. Krause*,  
6 77 Nev. 312, 317-18, 362 P.2d 724 (1961), Plaintiff must show her right to such equitable relief.  
7 *See Transaero Land & Dev. Co. v. Land Title Co. of Nev., Inc.*, 108 Nev. 997, 1001, 842 P.2d  
8 716 (1992) ("[I]n seeking equity, a party is required to do equity.") (internal quotation omitted).

9 In this case, Plaintiff voluntarily executed the Loan and the Deed of Trust. Plaintiff does  
10 not allege she has made her Loan payment, and now seeks to deprive the creditors of their  
11 security by quieting title. This would be an inequitable result. Where a defaulting mortgagor or  
12 trustor attempts to quiet title against the mortgagee, equity is served by requiring the debtor  
13 purporting to quiet title to pay the full amount of the outstanding debt. *See, e.g., Trusty v. Ray*,  
14 249 P.2d 814 (Idaho 1951); *see also Mix v. Sodd*, 126 Cal. App. 3d 386, 390 (1981) (no quiet  
15 title action may lie without paying the debt, even if debt is otherwise unenforceable). This Court  
16 should reject Plaintiff's attempt to obtain a windfall from her Loan by eliminating the Deed of  
17 Trust. Plaintiff's quiet title claim should be dismissed.

18 **IX. THE SEVENTH CAUSE OF ACTION FOR FRAUD THROUGH OMISSION**  
19 **AND THROUGH INDUCEMENT FAILS TO STATE FACTS SUFFICIENT TO**  
20 **CONSTITUTE A CAUSE OF ACTION.**

21 To establish fraud in the inducement, Plaintiff must prove by clear and convincing  
22 evidence each of the following elements: (1) a false representation made by Silva; (2) Plaintiff's  
23 knowledge or belief that the representation was false (or knowledge that it had an insufficient  
24 basis for making the representation); (3) Silva's intention to induce Plaintiff to consent to enter  
25 into a contract by making the representation; (4) Plaintiff's justifiable reliance upon the  
26 misrepresentation; and (5) damage to Plaintiff resulting from such reliance. *J.A. Jones Const.*  
27 *Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290-291, 89 P.3d 1009, 1018 (2004).

28 Here, Plaintiff fail to identify any contract by which Silva intended to induce Plaintiff to

1 enter into (third required element). Given this missing element, the remaining four required  
2 element additionally fail.

3 Under Nevada law, fraud by omission “requires a threshold duty to disclose.” *Nevada*  
4 *Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1417 (D. Nev. 1995). “It is axiomatic that an  
5 individual may only be subject to liability for nondisclosure when [he is] ‘under a duty to the  
6 other to exercise reasonable care to disclose the matter in question.’ ” *Does I Through VI v.*  
7 *KTNV-Channel 13*, 863 F. Supp. 1259, 1265 (D. Nev. 1994) (quoting Restatement (Second) of  
8 Torts § 551 (1977)).

9 Plaintiff makes two, vague and conclusory statements about the duty of Defendants  
10 (which allegedly includes TICOR and SILVA):

11 “Defendants ... knew that the future servicers would have no lawful right to  
12 foreclose on the Plaintiff’s home and that the future servicers would have not  
13 received any right to collect on the Note without consideration and, thus, were not  
14 holders in due course of the Note of the Plaintiff under Nevada law.”

15 “Defendants knew that, had the truth been disclosed, Plaintiff would not have  
16 entered into the loan, and had the truth of the discharges of the obligations been  
17 revealed, the Plaintiff would not have made payments to the Defendants pursuant  
18 to the mortgage obligations”

19 (Complaint, ¶¶148, 150).

20 These statements are utterly devoid of the particularity required by Rule 9(b) and do not  
21 indicate to what duty Plaintiff is referring. *See Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d  
22 282, 287 (9th Cir.1988) (“In order for a mere omission to constitute actionable fraud, a plaintiff  
23 must first demonstrate that the defendant had a duty to disclose the fact at issue.”). Without  
24 more, the fraud by omission claim must fail because Silva had no duty to disclose to Plaintiff any  
25 information pertaining to any alleged “lending and foreclosure practices.” *See Nevada Power*  
26 *Co.*, 891 F. Supp. at 1416-17, n.3 (D. Nev. 1995) (“straightforward commercial transaction” did  
27 not create a “fraud-based duty to disclose”). Consequently this seventh cause of action must be  
28 dismissed for failure to state a cause of action Silva.

**X. THE EIGHTH CAUSE OF ACTION FOR SLANDER OF TITLE MUST BE  
DISMISSED.**

Plaintiff’s eighth claim alleges slander of title. A claim for slander of title “involves false



1 and malicious communications, disparaging to one's title in land, and causing special damages.”  
2 *Executive Mgmt., Ltd. v. Ticor Title Co.*, 114 Nev. 823, 842 (1998). Malice requires that a  
3 defendant “knew that the statement was false or acted in reckless disregard of its truth or falsity.  
4 Where a defendant has reasonable grounds for belief in its claims, he has not acted with malice.”  
5 *Rowland v. Lepire*, 99 Nev. 308, 313 (1983). Plaintiff pleads no facts that could plausibly satisfy  
6 these elements.

7 Plaintiff's slander of title claim is based on the same untenable legal theory of Plaintiff's  
8 other claims, that Defendants “knew that they did not have any grounds to believe that Plaintiff  
9 owed them any money on the note nor AMERICA'S SERVICING COMPANY and all agents  
10 know who the actual investors on the Note and Deed of Trust for the Plaintiff are or how much is  
11 owed or how much has been discharged on that note or whether pursuant to another action, the  
12 note has been paid in part of discharged in whole.” (Complaint, ¶157).

13 As noted above, Plaintiff does not dispute that she executed the Promissory Note and  
14 Deed of Trust, nor does Plaintiff dispute that she defaulted on his Loan. Therefore, the recording  
15 of the NOD and commencement of the non-judicial foreclosure cannot be construed as a “false  
16 and malicious communication” disparaging to Plaintiff's title in the Subject Property. As a  
17 notice of default cannot make claim to Plaintiff's Subject Property or cast doubt to their  
18 ownership, no slander of title exists. Plaintiff's claim for relief fails. Therefore, the Court must  
19 dismiss this eighth cause of action with prejudice.

20 **XI. THE NINTH CAUSE OF ACTION FOR ABUSE OF PROCESS MUST BE**  
21 **DISMISSED.**

22 The elements of a cause of action based on abuse of process are: “(1) an ulterior purpose  
23 by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal  
24 process not proper in the regular conduct of the proceeding.” *LaMantia v. Redisi*, 118 Nev. 27,  
25 30 (2002). Abuse of process can arise from both civil and criminal proceedings. *Id.* An ulterior  
26 purpose is any improper motive underlying the issuance of legal process. *Posadas v. City of*  
27 *Reno*, 109 Nev. 448, 457 (1993).

28 Plaintiff does not have a valid claim for abuse of process because the documents about

1 which she complains are nonjudicial foreclosure notices. The fact that the notices are  
2 “nonjudicial” prevents Plaintiff’s claim for abuse of process. Further, the NOD is issued under  
3 authority of the deed of trust, not a court. Since the action is not under a court’s authority, there  
4 cannot be an action for abuse of process. *Smith v. Wachovia Mortgage Corp.*, No. C 09-1300,  
5 2009 WL 1948829, at \*5 (N.D.Cal. July 6, 2009). Plaintiff’s claim fails and should be dismissed  
6 with prejudice.

7 **XII. PLAINTIFF’S REQUESTED RELIEF FAILS AS A MATTER OF LAW.**

8 Directly following the Complaint’s Ninth Claim for Relief, Plaintiff requests Declaratory  
9 Relief, Reformation and Quiet Title. Plaintiff’s request fails as these remedies rely on Plaintiff’s  
10 other failed claims. If the substantive laws to which they are tethered fail, the corresponding  
11 remedies must also be dismissed. *Aguilar v. WMC Mortg. Corp.*, 2:09CV01416-ECR-PAL, 2010  
12 WL 185951 (D. Nev. Jan. 15, 2010)(stating that based upon the dismissal of the substantive  
13 claims the Court need not address Plaintiffs’ request for rescission and declaratory relief  
14 independently). This claim should be dismissed with prejudice.

15 Given the failure of all of Plaintiff’s claims against Silva, the remedies requested by  
16 Plaintiff as against Silva fail and require dismissal with prejudice.

17 **XII. CONCLUSION**

18 For all of the foregoing reasons and pursuant to FRCP 12(b)(6), STANLEY S. SILVA  
19 respectfully request that this Court dismiss them from this litigation with prejudice.

20 DATED this 9<sup>th</sup> day of November, 2011. FIDELITY NATIONAL LAW GROUP

21  
22 /s/ Thomas A. Ryan

23 Thomas A. Ryan, Esq.  
24 Nevada Bar Number 5117  
25 2450 St. Rose Pkwy., Ste. 150  
26 Henderson, Nevada 89074  
27 Attorneys for Defendant *Stanley S. Silva*  
28



**CERTIFICATE OF SERVICE**

I hereby certify that I electronically transmitted the foregoing **DEFENDANT STANLEY S. SILVA'S MOTION TO DISMISS** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties listed as CM/ECF registrants, or to the following non-registrants by U.S. Mail, on the date below shown.

Rick Lawton, Esq.  
1460 Hwy 95A, North #1  
Fernley, NV 89408  
Attorney for Plaintiffs

**DATED:** November 9, 2011

/s/ Jennifer O'Brien  
An employee of Fidelity National Law Group